Office - Supreme Court, U.S.
FILED
SEP 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2385

IN THE

Supreme Court of the United States

October Term, 1981

BRUCE KING, Governor of the State of New Mexico and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

v.

FRANK I. SANCHEZ, *et al.*, RAYMOND VARGAS, *et al.*, D. H. "CHILI" YAZZIE, *et al.*, RONALD G. OLGUIN, *et al.*, and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

APPELLANTS' BRIEF IN OPPOSITION TO THE VARIOUS MOTIONS TO AFFIRM

Of Counsel:

DAVID A. DONOHOE, P.C.
CHARLES L. WARREN
ALAN J. STATMAN
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000

MICHAEL BROWDIE
1117 Stanford, N.E.
Albuquerque,
New Mexico 87110
(505) 277-5326

PAUL J. KELLY, JR.
HINKLE, COX, EATON, COFFIELD & HENSLEY
600 Hinkle Building
P.O. Box 10
Roswell, New Mexico 88201
(505) 622-6510
Counsel of Record

CHARLES C. SPANN
SPANN, LATIMER & HOLLOWA
914 First Interstate Bank Building
P.O. Box 1031
Albuquerque,
New Mexico 87103
(505) 243-3525
Counsel for Appellants

TABLE OF CONTENTS

Page

I. THE DISTRICT COURT INCORRECTLY VIEWED THE POPULATION-BASE ISSUE AS BEING LINKED WITH DEVIATIONS AMONG DISTRICTS FROM RAW POPULATION FIGURES AND FAILED TO CONSIDER WHETHER NEW MEXICO HAD ESTABLISHED A CONSTITUTIONALLY PERMISSIBLE POPULATION BASE THROUGH USE OF THE VOTES-CAST FORMULA 3

II. THE QUESTION PRESENTED BY APPELLANTS IS PROPERLY FRAMED FOR RESOLUTION ON THE MERITS AFTER PLENARY REVIEW 6

TABLE OF AUTHORITIES

Page

CASES

Burns v. *Richardson*, 384 U.S. 73 (1966) 2,3,4,5

Gaffney v. *Cummings*, 412 U.S. 735 (1973) 5

Martin v. *Venables*, 401 F. Supp. 611 (D. Conn. 1975) 5

Yelverton v. *Driggers*, 370 F. Supp. 612 (M.D. Ala. 1974) 5

No. 81-2385

IN THE

Supreme Court of the United States

October Term, 1981

BRUCE KING, Governor of the State of New Mexico and SHIRLEY HOOPER, Secretary of State of the State of New Mexico,

Appellants,

v.

FRANK I. SANCHEZ, *et al.*, RAYMOND VARGAS, *et al.*, D. H. "CHILI" YAZZIE, *et al.*, RONALD G. OLGUIN, *et al.*, and PATRICIA M. MARSH,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

APPELLANTS' BRIEF IN OPPOSITION TO THE VARIOUS MOTIONS TO AFFIRM

Pursuant to Sup. Ct. R. 16.5, Appellants respectfully submit this single response to the three motions to affirm filed by the Vargas Appelles, the Sanchez Appellees and the United States, respectively.

ARGUMENT

Appellees in their respective motions miscast the ruling of the court below and as a result paint an erroneous picture of the issue presented for review by this Court. Appellants are therefore compelled to take this opportunity to: (1) correct

Appellees' mischaracterization of the district court's opinion;[1] (2) demonstrate the fallacy of Appellees' arguments concerning the issue presented by the record below; and (3) properly frame the issue raised by this case for review by this Court. The preeminent issue before the Court is whether the district court erred in holding that state legislative apportionment must be based exclusively on raw population figures. The district court totally failed to consider whether New Mexico could use a population base other than one based solely on census population or whether the votes-cast method adopted by the State established a constitutionally permissible population base. Appellees' attempt to frame the issue on appeal as something other than this and their selected attack on supposed "deficiencies" in the record is nothing more than a smoke screen to obstruct the resolution of this key issue.

---

[1] Appellees incorrectly state that the lower court ruling left to the New Mexico State Legislature "both the method *and data* to be used in reapportionment," Vargas Motion at 7 (emphasis supplied). The lower court clearly left to the Legislature "the method to employ in again attempting reapportionment," J.S. App. at B-3 to B-4, but just as clearly the district court required the legislature to construct districts based on data which reflects "actual population," J.S. App. at B-4.

Appellees also suggest that because the lower court made reference to the ability of the State to correct census data errors, the court somehow sanctioned the use of other than a total population base. Vargas Motion at 7-8. However, a reading of the relevant paragraph in context demonstrates that the "obvious errors" mentioned by the court referred only to errors in counting the total population or errors in the translation of total population data from census enumeration districts and blocks to noncoterminous precincts. *See* J.S. App. at B-3.

Finally, Appellees suggest that the lower court made a series of critical "findings" which somehow preclude review of the issue raised by Appellants. *See* Vargas Motion at 8, Sanchez Motion at 5-6. As will be discussed below, the fact is that the district court made no such findings, and did not hold as Appellees argue, that the standard set out in *Burns* v. *Richardson*, 384 U.S. 73, 94-95 (1966) had not been met in this case. The only holding of the lower court was that legislative districts in New Mexico must be constructed "on the basis of actual population," J.S. App. at B-4.

I. THE DISTRICT COURT INCORRECTLY VIEWED THE POPULATION-BASE ISSUE AS BEING LINKED WITH DEVIATIONS AMONG DISTRICTS FROM RAW POPULATION FIGURES AND FAILED TO CONSIDER WHETHER NEW MEXICO HAD ESTABLISHED A CONSTITUTIONALLY PERMISSIBLE POPULATION BASE THROUGH USE OF THE VOTES-CAST FORMULA.

Contrary to Appellees' contentions, the district court held that the legislature of New Mexico must construct districts based on data which reflects "actual population," J.S. App. at B-4. A reading of the opinion of the district court demonstrates that the court rejected *per se* New Mexico's effort to counteract the effects of the existence of ineligibles in its population. That opinion fails to discuss at all the legitimacy of a state attempting to utilize a population base other than one based solely on raw population. The holding of the district court was that New Mexico *must* apportion its districts exclusively on the basis of raw population figures. It is clear that the district court *never* considered whether there existed another permissible population base by which the State could apportion. Therefore, the lower court's discussion concerning deviations "from the population ideal," J.S. App. at B-2, is irrelevant, and Appellees' mischaracterize the threshold issue before the Court in this case by basing their arguments on these supposed deviations.

Burns v. *Richardson*, 384 U.S. 73 (1966), indicates that an apportionment plan which derives from a base other than actual population must be judged by whether it approximates the base, *not* whether it approximates an *actual population base*. *Burns* thus permits the use of an alternative population base and, therefore, the deviation percentages cited by the district court in its opinion and Appellees in their briefs are inapplicable until the question of what that base can be is resolved.[3] Deviations from actual population have no place in

[3] Indeed, it is not in dispute that if New Mexico's method of deriving the relevant population base is constitutionally permissible, then the numerical deviation present among legislative districts is not more than 5% in any case. J.S. at 4.

the calculation *if* actual population is not the base being utilized. The district court never reached that issue because it held that actual population is the only base which may be used. The approach taken by Appellees merely restates their position that apportionment may only be carried out on the basis of actual population, a position that was accepted in its entirety by the district court.

The mere recitation of the *Burns* standard in the district court's preliminary statement of the applicable law, J.S. App. at B-2, hardly qualifies as a holding that the *Burns* circumstances have not been established in this case as Appellees argue. *See* Vargas Motion at 9. There is no other discussion of *Burns* or the factors present in that case to be found in the lower court's opinion. Appellees' attempt to turn this language into "findings" which they assert formed the basis upon which the district court rejected the applicability of *Burns* to the present case is nothing more than sheer sophistry. *See* Vargas Motion at 8, Sanchez Motion at 5-6. The issue clearly joined is whether New Mexico is foreclosed *per se* from apportioning on a population base other than one exclusively based on raw population figures, and if it is not, whether the votes-cast formula adopted by New Mexico is constitutionally permissible on the basis of this "other" base.

When properly viewed in this way, Appellees' argument concerning the maximum deviation constitutionally permissible "from population equality" evaporates. Appellees first argue that the Court must first look to actual or raw population (all people who reside in an area irrespective of age, eligibility to vote, citizenship, etc.) to see if the deviations from this population among districts under the New Mexico plan are excessive. Vargas Motion at 12-15, Sanchez Motion at 5-6, Government's Motion at 7, 9. They then argue that if the deviations from an "actual population base" are inordinate the State may not use that plan, even if the population base under the plan is not "actual population." *Id.* What Appellees and the court below both ignore is that neither the reasoning of *Burns* nor any of the other cases that have dealt with this issue dictates such an approach. In the language of *Burns* "[i]t is enough if it appears

that the distribution of registered voters (or whatever other base is chosen) approximates distribution of state citizens *or another permissible population base*." 384 U.S. at 95 (emphasis supplied).[3] *Burns* does not state that the "actual population base" is the *only* "permissible population base."

In *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), the Court clearly and unequivocally,[4] rejected the notion that raw census

---

[3] Appellees also seek to elevate this Court's remarks in *Burns* about a voter or registered voter base into some kind of a constitutional precondition to the use of any base other than actual population. Vargas Motion at 20; Sanchez Motion at 6. However, that dicta from *Burns* establishes no such precondition and none of those concerns expressed by the *Burns* Court are present here. First, as previously pointed out, the New Mexico formula is not purely voter based—it is rather a meld of population and voter bases. J.S. at 12-14.

Second, contrary to Appellees' contention, the formula does not "perpetuate underrepresentation of groups constitutionally entitled to participate in the process." *Burns*, 384 U.S. at 92. The thrust of this concern relates to the imposition of a voter or registered voter basis on a system which systematically precludes groups from participation in the political process. *See e.g., Yelverton v. Driggers*, 370 F. Supp. 612 (M.D. Ala. 1974) (where voter registration is disproportional due to history of racial discrimination, use of voter registration data leads to impermissible dilution). The evidence before the district court clearly established that the groups raising the claim here have had every opportunity to register and vote and thus, there can be no claim that they are precluded from doing so. *See Martin* v. *Venables*, 401 F. Supp. 611, 617 (D. Conn. 1975). Indeed, the evidence establishes that the State through the Secretary of State's Office has and continues to affirmatively aid and encourage minority registration and voting.

[4] The Government impliedly concedes that the *Gaffney* Court's concern with raw population is relevant here, but suggests that Appellants take that discussion out of context. Government's Motion at 7, n. 9. Appellants, however, have never contended that this case is factually similar to *Gaffney*. *Gaffney* was a garden variety numerical deviation case in which this Court reversed a lower court order invalidating the Connecticut legislative apportionment scheme. The Court held in effect that the 7.83% maximum deviation among districts was de minimis and, therefore, did not make out a prima facie case. Unlike this case, in *Gaffney* there appears to have been no dispute about the proper population base. The point Appellants wish to make is that the important discussion in *Gaffney*, which may

data should ever rise to the level of a constitutional imperative as suggested by Appellees and, in fact, indicated the pitfalls of such reliance. *Id.* at 749.[5] This case provides a further opportunity for the Court to supply some needed direction to New Mexico and other states attempting to grapple with "special population" problems.

II. THE QUESTION PRESENTED BY APPELLANTS IS PROPERLY FRAMED FOR RESOLUTION ON THE MERITS AFTER PLENARY REVIEW.

Appellees refer to an incomplete segment of one witness's testimony and to supposed gaps in the record, and on that basis contend that the factual record in this case does not provide the vehicle for the resolution of the issues previously outlined by Appellants.[6] In fact, the record including Mr. Buchanan's testimony, is replete with material relevant to a full and fair resolution of this case on appeal. Among that material is evidence concerning the presence and location of large military installations in New Mexico, (Tr. 704-5); the size and location of correctional institutions and hospitals, (Tr. 704, Exhibits T, U); and the presence of large institutions of higher learning (Tr. 704, Exhibits U, ZZ). The record also contains a description of the illegal alien problem faced by New Mexico,

---

have been helpful to the numerical deviation issue presented there, is even more significant in the context of the present case. J.S. at 8-9 and 11-13. It is after all this case which squarely raises the issues to which the *Gaffney* discussion most appropriately applies, *i.e.*, the permissible range of choices available to a state in the selection of the relevant population to which the fourteenth amendment deviation analysis ought be applied.

[5] Appellees own expert conceded that "if you were trying to equalize the number of people registered or number voting, the formula would have that effect." (Tr. 200).

[6] The entirety of Mr. Buchanan's testimony (Tr. 688-841) fully supports Appellants' position before this Court and clearly demonstrates that reliance on a selected portion of testimony taken out of context can sometimes be misleading. For example, Appendix A *infra* contains the testimony of Mr. Buchanan which immediately followed that quoted at length by Appellees.

as well as an estimate of numbers and the location of their concentrations throughout the State. (Tr. 550-52, 707, Exhibit AAA, 1029). This case therefore squarely presents for resolution by this Court the question of whether a base other than actual population may be used for reapportionment purposes and the corollary question of whether the "special population" problems faced by New Mexico are such that the population-based, votes-cast formulaic approach is a constitutionally permissible option under the fourteenth amendment.[7]

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court deny the motions for summary affirmance, note probable jurisdiction, and set this matter for plenary consideration on the merits.

---

[7] Appellees also argue that the formula is "not uniformly applied throughout New Mexico," because some of New Mexico's legislative districts comprise only whole counties and others do not. Vargas Motion at 3, n. 3. The formula is uniformly applied throughout the State, and in its application to districts which are comprised of whole counties directly ties back to the county-wide census data. This focus on raw census population data demonstrates that the formula is not solely votes-cast as Appellees would characterize it, but rather is significantly attached to county-wide total census population, thus properly balancing both "population" and "votes." *See* J.S. at 12-14.

Respectfully submitted,

Of Counsel:

DAVID A. DONOHOE, P.C.
CHARLES L. WARREN
ALAN J. STATMAN

AKIN, GUMP, STRAUSS,
HAUER & FELD
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000

MICHAEL BROWDIE
1117 Stanford, N.E.
Albuquerque, New Mexico
87110
(505) 277-5326

PAUL J. KELLY, JR.
HINKLE, COX, EATON,
COFFIELD & HENSLEY
600 Hinkle Building
P.O. Box 10
Roswell, New Mexico 88201
(505) 622-6510
Counsel of Record
CHARLES C. SPANN
SPANN, LATIMER &
HOLLOWA
914 First Interstate Bank
Building
P.O. Box 1031
Albuquerque, New Mexico
87103
(505) 243-3525
Counsel for Appellants

APPENDIX A

TESTIMONY OF CLAY BUCHANAN
Tr. 792–98

Q. (Mr. Goldberg, continuing.) Does it [votes cast] seek to identify registered voters and estimate who are the registered voters and how many live in that precinct?

A. No.

Q. Does it seek to identify an estimate of people who are eighteen and over?

A. No, it does not.

Q. And does it seek to estimate and identify people who go into the polling booths and cast ballots?

A. No.

Q. Does it seek to estimate–identify and estimate people who are qualified to vote, but may or may not register to vote?

A. No.

Q. Does it seek to identify and estimate any other identifiable group of population within that precinct, that you can think of?

A. No, I think it seeks to eliminate.

Q. Okay. Would you describe for me, who it seeks to eliminate, Mr. Buchanan?

A. It seeks to eliminate the large groups unidentifiable for subtraction, unidentifiable, who either through their personal disinclination or some sort of disability, do not participate in our political process.

Q. Would you define for me—or rather, would you describe for the Court, what you mean by "do not participate in our political process"?

A. All of the people who have legal disqualifications, people who have religious scruples against voting, people who simply do not choose to vote, who do not want to vote.

Q. Why wouldn't—then, just counting the people that go into the voting booth and cast ballots, why wouldn't that do the job for you, Mr. Buchanan?

A. The formula brings in the raw population count and makes it a part of this artificial figure. In other words, this is not using raw census counts, which includes all the ineligibles, except that it provides for the total for the county. The theory of the formula, as it has changed, in my mind, over the years, is that it is a rough unscientific figure, political version of how to arrive at the concept of one-man, one-vote.

Q. But if the purpose of the formula, Mr. Buchanan, is to exclude people who do not choose to participate in the political process, these people would have legal disabilities, under eighteen, felons, aliens, or otherwise legally disqualified, people who have religious or moral—groups of people who are just too lazy to get out and vote, why do we need some formula approach at all? Why don't we just base our reapportionment exclusively on totaling up the number of people in the state who cast their ballots, dividing them by seventy, to make the ideal district and determine the precincts by who goes into the voting booths, and ballots?

A. Originally, the formula was written in the law because it was the Legislative Council's staff's suggestion—concept that the court had suggested that we use the population statistics where we had them, and the lowest we had was the county, and that where we didn't have population statistics from the census bureau to fit our precincts, that we use votes cast for governor in the last general election, and so we were attempting to—since the apportionment had to go back to the judge or court, we thought, we attempted to give him what he asked for.

Q. That's always a prudent course of action?

A. The—we are now talking about twenty years later. There are a great number of things that have been written about one-man, one-vote. I have thought a great deal about it. We spent most of our time in the early Sixties doing this, and while it did not start out with any scientific intent to arrive at some perfect thing, it was a way to achieve it. The point was that—

Q. Excuse me, Mr. Buchanan, I will let you finish, but what do you mean by "it"?

A. Achieve an apportionment for the New Mexico Legislature that followed the concept of one-man, one-vote.

Q. Do I understand—I'm sorry, I don't want to interrupt you.

A. Well, earlier on, you asked me some questions—I was asked questions, I don't know who asked them, about my expectations of the census bureau. And I think maybe it was on direct.

Q. Yes, I think it was Mr. Kelly. I haven't gotten to that, yet.

A. Anyway, the fact that it was an—expedient when we did it, nobody thought about what we were doing and so forth, then as the concept developed and we wonder what it is we are talking about, then the formula begins to appeal to you in a sense that this is a tool for the legislature to do it, to do an apportionment that will have the voter equivalency, the vote concept, of equality and the population concept of equality melted.

We haven't asked anybody to do a model of it, or anything like that, but it appealed to a theory that the population was important, that the politics was important and voting was important, and it was a way to give to the legislature to do it, a method.

Q. And you adhere to the view that population is important in reapportioning the legislature?

A. The population is not the criteria for the state legislature that it is for congress, for example.

Q. Let's look at congress, is population an important element of the data base for reapportioning the United States Congress, redistricting the United States Congress in the State of New Mexico?

A. Yes.

Q. Is the congressional redistricting done on the basis of total population?

A. Yes.

Q. Is population an important element of redistricting the state legislature in New Mexico?

A. Not raw population.

Q. What do you mean—what do you mean by "raw population"?

A. Well, raw population is those figures published by the census that do not teli us a great deal about the population. It doesn't tell us when you look at a number in the census, that this person is an alien, convicted felon, who has been certified to be insane, that's a resident of Michigan and votes absentee, that he—what he is doing here. All we know is that the census bureau has counted a warm body.

Q. But by "raw population," then, you are really talking about the raw census figures?

A. Yes.

Q. The raw modifies the census figures. Is any element—without reference to who is doing the counting and how valid

the counting may be, just looking to people out there, is population an important part of determining—the data base for building a reapportionment?

A. It is in some states. In New Mexico, I don't think it's as important as other issues.

Q. Okay. So it's certainly not in your top priority in New Mexico?

A. No.

Q. And the votes-cast formula does not make population a top priority for reapportionment of the state legislature, in New Mexico, does it?

A. Yes. It is a composite figure, total populations, if that's what you mean, are used to create single-member districts. They are sometimes used as a unit solely within another legislative district. I'm not trying to discount population. I'm saying that raw population, without telling what they do, is not apportioned part of one-man, one-vote.

Q. Again, without reference to whose—whether you are using the census figure or using early census figures or late, or whether they are being adjusted or whatever, is population—a count of population an important part of reapportionment in New Mexico?

A. Yes.

MR. KELLY: If the Court please, I—I believe that question has been asked and answered at least twice.

JUDGE SETH: It's been asked several times and answered several times. I think we have pretty well covered the subject, counsel.

Q. (Mr. Goldberg, continuing.) You stated, Mr. Buchanan, that your views of the votes-cast formula has changed over the years, is that correct?

A. Yes.

Q. In the estimate of the Legislative Council Service, has the votes-cast formula ever been intended to estimate population?

A. By "population" you mean numbers. It has never been intended to estimate numbers of warm bodies.